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In the Supreme Court of The United States

October Term, 1964

No. 689

THE CITY OF TULSA, OKLAHOMA,
A Municipal Corporation, *Petitioner*

vs.

MIDWESTERN DEVELOPMENTS, INC.,
An Oklahoma Corporation, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondent, Midwestern Developments, Inc., as plaintiff filed an action in the U. S. District Court of the Northern District of Oklahoma seeking to quiet title to a 60' strip of land formerly the north side of the right-of-way of the M.K.&T. Railroad in certain lands in Tulsa County. Plaintiff was successor in title from the original allottee, a Creek Indian freedman, and acquired its title by mesne conveyances from the original allottee. The original allottee had granted a right-of-way deed to the Missouri, Kansas & Oklahoma Railway, predecessor to the Missouri, Kansas & Texas Railway. The City of

Tulsa, Petitioner, acquired the 60 foot strip for purposes of an expressway and received a conveyance and transfer of title from the railroad. The Plaintiff below, contended under the Act of Congress, whereby the railroad procured permission to procure the right-of-way, there was a clause which provided that an abandonment for railroad purposes or upon transfer by the railroad, title reverted to the original Indian Tribe or its allottee and its successors in the chain of title. Plaintiff sought to quiet title and damages in reverse condemnation.

The City of Tulsa filed a Motion to Dismiss on jurisdictional grounds, contending the causes of action of the Plaintiff did not arise under the Constitution, laws, or treaties of the United States, and the United States Court was without jurisdiction. Following a hearing in which the action was dismissed for lack of jurisdiction, Appellant appeals to this Court, The Court of Appeals, Tenth Circuit reversed the trial court, 333 F(2)1009. The City of Tulsa has herein sought Certiorari.

STATEMENT OF FACTS

Plaintiff's Amended Complaint alleges in substance (TR-5) that the Plaintiff is a corporation organized and existing under and by virtue of the laws of Oklahoma, and that the Defendant is a municipal corporation. That the Court has jurisdiction by reason of the fact the value of the property in controversy exceeds $10,000.00 exclusive of interest and costs and arises under the laws and treaties of the United States.

Plaintiff alleged that it was the owner in fee simple and was entitled to possession of the following described lands, to-wit:

The North 60 feet of a 75' strip lying north of the centerline of the M. K. & T. Railroad in the NW/4 of Section 22, Township 19, North, Range 13 East, Tulsa County, Oklahoma.

Plaintiff alleged further that it derived its title by reason of the fact the lands were allotted to one Clydie Landrum, a Creek freedman, Entrolled September 18, 1888, by reason of a Homestead Deed from the Muskogee Creek Nation to Clydie Landrum dated November 18, 1903, filed January 30, 1903, and also an Allotment Deed from the Muskogee Creek Nation to Clydie Landrum dated November 18, 1902, recorded September 29, 1910. These deeds together covered the entire northwest quarter of Section 22, Township 19 North, Range 13 East, in Tulsa County. Copies of these instruments were attached to Plaintiff's Complaint.

Plaintiff then alleged (TR-7) that on the 10th day of September, 1902, Clydie Landrum's mother, Laura Eubanks, as mother and natural guardian of Clydie Landrum, executed and delivered to the Missouri, Kansas & Oklahoma Railroad Co., a corporation, a right-of-way deed which was duly recorded, and a copy was attached to the Complaint, marked Plaintiff's Exhibit C. This deed purported to convey to the railroad a strip of 150 feet in width through the NW/4 of the allotment of Clydie Landrum.

Plaintiff alleged that the deed was executed under the laws of the United States and conveyed only an easement; and that the fee simple title to the land claimed by the Defendant became vested in one Evalyn M. English by mesne conveyances from succeeding owners in the chain of title. Further, that in

some manner, not a matter of public record, the title to the right-of-way became vested in the Missouri, Kansas & Texas Railway Co., which company operated a railroad upon the right-of-way across Plaintiff's land.

This right-of-way deed is set forth (TR-14) and contains the following language:

> "To Have and to Hold the premises hereby conveyed, with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said Missouri, Kansas and Oklahoma Railroad Company, party of the second part, its successors and assigns, in fee simple forever, - - - "
>
> • • •
>
> "This deed is made by the party of the first part over the allotment of the said Clydie Landrum, the Certificate Number which is Number 2388, under authority of the provisions of the act of Congress of March 2, 1899, and is intended to convey all such right as said party of the first part may lawfully convey to said party of the second part under the provisions of said Act of Congress and the laws of the United States, - - - "

Plaintiff alleged further (TR-7) that on the 8th day of August, 1960, Evalyn Bresser, formerly Evalyn M. English, and her husband conveyed to the Plaintiff, Midwestern Developments, Inc., by quit-claim deed the following lands in Tulsa County, described as follows, to-wit:

> "A triangular tract of land containing approximately 23⅛ acres in the Northwest Quarter (NW/4) of Section 22,

> Township 19 North, Range 13 East, being more particularly described as being all of the land in the Northwest Quarter of said Section 22, lying north of the MK&T Railroad and subject to a right of way of the MK&T Railroad and lying south of 31st Street, subject to mortgages and encumbrances of record."

This deed was duly recorded and attached as an exhibit (TR-15). The Bressers were in the chain of title.

Plaintiff alleged further that on the 3rd day of November, 1955, the railroad executed a conveyance attempting to convey a 60 foot strip off the north side of its claimed 150 foot right-of-way, and also a like strip of 60 feet off the south side of its right-of-way to the City of Tulsa for the Broken Arrow Expressway reserving a 30 foot strip down the center for railroad purposes. This deed was recorded November 8, 1955, in the Office of the County Clerk of Tulsa County. A copy of this deed was attached to the Complaint as Exhibit "F" and appears in the Transcript at page 22. Omitting formal parts, the pertinent parts are as follows:

> "does hereby grant, bargain, sell and convey unto The City of Tulsa, Oklahoma, party of the second part, the surface only in and to the following described real property and premises situate in Tulsa County, Oklahoma, to be used as right-of-way for a limited access street, roadway or freeway, and for no other purpose, to-wit: (then follows the description)"

The deed then contains the following language (TR-24):

> "together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title

> to the same to be free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature made or suffered to be made by the party of the first part, subject to all of the terms and conditions hereof." "To have and to hold said described premises unto the said party of the second part, its successors and assigns forever."

The deed then reserved the oil and gas and other minerals to the railroad, and then contained the following language:

> "First party hereby excepts from the terms of this grant, and reserves unto itself, its successors and assigns, an easement thirty (30) feet wide, lying between two parallel lines fifteen (15) feet on either side of the center line of all of first party's presently existing railroad tracts, turnouts, industry or spur tracks, turning out of or connecting with first party's main line track running between the two strips of land hereby conveyed.
>
> "This conveyance is made pursuant to that certain letter agreement between the parties hereto dated September 27, 1955, a duplicate original of which is on file in the office of the City Auditor of the City of Tulsa; and this conveyance is expressly made subject to all of the terms and conditions of said letter agreement."

From the description it will be observed that the land in question at that time was not in the City of Tulsa.

Plaintiff alleged also (TR-7) that the City and the railroad attempted to enter into a contract, a copy of which was marked Plaintiff's Exhibit "E" and incorporated into the Complaint.

This contract was in letter form between the Missouri, Kansas & Texas Railroad and the City of Tulsa. The pertinent parts were as follows: (TR-16, et. seq.)

> "the land so to be acquired by the City is desired for the construction of a freeway. The City desires to outline in general the terms and conditions upon which the City is willing to acquire title to and use such right-of-way
>
> "1. Your company will agree to convey to the City of Tulsa surface rights in all of the land embraced in its present right-of-way in the City of Tulsa, Oklahoma, from the point of intersection thereof with 13th Street to the intersection thereof with Sheridan Road, except you will retain for railroad right-of-way purposes a strip of land 30 feet wide, lying 15 feet on either side of the center line of your existing main line tract, * * * Said conveyance shall be by deed, without covenants or warranty, other than as against the Railroad Company's existing mortgage and against unrecorded claims, if any, of persons holding under or through your company and the existence of which your company has not heretofore formally notified City in writing."
>
> "20. At any time before delivery of said deed and conveyance to City, as aforesaid, City shall have the right, and it is hereby authorized and empowered by your company, to institute in your name, but without cost c. expense to you, an action or actions to quiet title to said land or any part thereof and prosecute the same to final judgment against any former owner or claimant or heirs, representatives, successors or assigns of such owner or claimant.

"21. Likewise, at any time before said deed and conveyance is delivered to City, as above provided, City shall have the right to institute and prosecute to final judgment eminent domain proceedings against your company and/or any owner or claimant to said land or any part thereof, and/or the heirs, representatives, successors or assigns of such owner or claimant, to condemn said lands for street or highway purposes, • • •"

• • •

"26. While City plans to use said land for street or highway purposes, nothing herein contained shall be construed as an obligation, either express or implied, upon the part of the City to construct a freeway, street or highway upon the land to be acquired by it hereunder or to cause the same to be so used, but the City agrees to use said land for no purpose other than for street or highway purposes or as incident thereto.

"27. The owner of the oil, gas and other minerals under the land to be conveyed hereunder shall never have the right to drill, mine or otherwise use the surface of said land for the purpose of extracting or removing said substances."

Plaintiff then alleged (TR-8) that by reason of the laws of Congress and the treaties enacted pertaining to the Indian Nations, that the right-of-way acquired by the M. K. & O. Railroad owned by the M. K. & T. Railroad was only an easement and not a fee simple title; and further, by reason of the acts of Congress pertaining to rights-of-way, when any portion of the right-of-way shall cease to be used for railway purposes, that the portion not used shall revert to the nation or tribe of

Indians from which the same shall have been taken. Further, that any attempted alienation or encumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument made after the approval of the Act of February 28, 1902, commonly known as the Enid and Anadarko Act, 32 Statutes at Large 43, should operate to revert said land to the Indian Nation and its subsequent allottee and the grantees of said allottee.

The Plaintiff then alleged that the Defendant claims title and estate in the premises in fee simple adverse to the title of the Plaintiff by reason of the attempted conveyance from the Missouri, Kansas & Texas Railroad to the City of Tulsa, and that the deed and claim of the Defendant is void and of no effect for the reasons therein set forth. Further, that the deed by the mother and natural guardian was of no effect to vest a fee simple title in the Missouri, Kansas & Oklahoma Railroad. Plaintiff's prayer then asked that the Defendant be required to set forth the nature of its claim to said lands, and the Court decree Plaintiff's claim and title to the land, to-wit:

The North 60 feet of a 75' strip lying north of the centerline of the railroad is valid and perfect, and the Defendant has no right, valid claim or title therein or interest whatsoever in the lands, Plaintiff sought to quiet title in the Plaintiff.

For a second cause of action the Plaintiff alleged it was the owner of the lands described in its Complaint (TR-9), and that the Defendant, the City, on the 4th of March, 1960, by resolution of the Mayor and Board of Commissioners declared the public necessity of taking, appropriating, condemning and acquiring a right-of-way and construction of the Broken Arrow

Expressway and requiring the acquisition of certain property for temporary construction easements and certain property for utility easements; and previously on or about the 8th of July, 1955, by resolution attempted to authorize the acquisition by the City of Tulsa from the M. K. & T. Railroad a strip of land comprising the south 60 feet of the lands above described belonging to the Plaintiff and did attempt to obtain a conveyance of the lands from the M. K. & T. by deed on November 3, 1955.

Plaintiff adopted all the allegations set forth in its first cause of action, and then alleged that the City of Tulsa constructed an expressway on the 60 feet of property taken and has taken lands belonging to the Plaintiff without due process of law or by any legal condemnation proceedings.

Plaintiff then alleged that the lands were taken without consent of the owner, namely, Clydie Landrum, a minor, an incompetent Creek freedman, and that under the Constitution of the State of Oklahoma and under the laws of the United States the fee of land taken by common carriers for right-of-way without the consent of the owner remains in the owner subject only to the use for which it is taken.

Plaintiff alleged further that upon abandonment of the property by the railroad in conveying it to the City of Tulsa the easement was destroyed, and the use for which it was taken abandoned, and Plaintiff upon the taking of the property became entitled to compensation for the property, and Plaintiff is entitled to receive from the City of Tulsa a reasonable, fair and market value, and have the value determined pursuant to the statutes provided in such cases according to law.

The Defendant, City, (TR-25) filed a Motion to Dismiss the first cause of action and the second cause of action, because the causes of action did not arise under the Constitution, laws, and treaties of the United States, and the Court was without jurisdiction. There was an argument on the Motion to Dismiss before the Court, and after argument the Court stated:

> "So the Court will have to sustain the defendant's motion to dismiss, and will enter an order dismissing the suit without prejudice."

The Order of Dismissal, as signed by the Court, appears on page 34 of the Transcript. In due course notice of appeal was given, and the appeal lodged in the Court of Appeals.

QUESTIONS PRESENTED

The principal question is whether or not the facts present a case of Federal jurisdiction.

ARGUMENT

The jurisdictional allegation in the Complaint is: "And that this Court has jurisdiction by reason of the fact that the value of the property in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and arises under the laws and treaties of the United States."

The treaties with the Creek Nation and the laws of Congress granting the railroad company permission to obtain right-of-way to the Indian lands, we believe, are determinative of the question. The Federal jurisdictional statutes is Title 28, U.S.C.A. § 1331, as amended in 1958, as follows:

> "Federal question: amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

It is submitted that the allegations in the Complaint set forth sufficiently the facts, and a recent case decided by the Court of Appeals, 10th Circuit is in point. *St. Louis-San Francisco Railway Company, a corporation vs. Peter C. Walter, et al.*, decided May 25, 1962, 305 F.2d 90:

"Action involving ownership of a tract of land over which railroad had an easement. The United States District Court for the Northern District of Oklahoma, Royce H. Savage, J. entered judgment unsatisfactory to railroad and it appealed. The Court of Appeals, Breitensten, Circuit Judge, held that where railroad held an easement across certain public lands for a stockyards tract, upon termination of use for which the easement was taken, owner of the subservient estate held title unencumbered by the easement."

"8. Railroads Key 82 (5).

"Upon abandonment of an easement by a railroad, covering a certain stockyards tract, title vested in adjoining landowner under act providing that upon such abandonment title was to vest in owner of legal subdivision of which land so abandoned was a part, even though abandoned easement intercepted a lot diagonally. Act. April 26, 1906 § 14, 34 Stat. 137."

We will not repeat the facts of this case and unnecessarily encumber this Brief, except point out that the Court in its Opinion says:

"Jurisdiction is based both on diversity and on the fact that the controversy arises under the laws of the United States."

The policy of the United States government in its dealings with the Indians, the treaties with the Indians, and the laws point to the policy of the government being that where railroads obtained a right-of-way, that on abandonment or selling of the right-of-way there should be some restrictions imposed.

We find after the conclusion of the Civil War the United States government made a treaty with the Creek Indians, 14 U.S. Stat. at Large page 787. This treaty, regarding right-of-ways, provides as follows:

"Article 5

"The Creek Nation hereby grants a right-of-way through their lands, to the Choctaw and Chickasaw Country to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek Country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with the Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by member or members of the Creek Nation lying along the line of said contemplated railroad, * * * "

> " • • • Provided however, that said land thus sold shall not be reconveyed, lease or rented to or be occupied by anyone not a citizen of the Creek Nation according to its laws and recognized usages: • • • "

Act of March 3, 1899, 30 Stat., 1368:

> "An act to authorize the Fort Smith and Western Railroad Company to construct and operate a railway through the Choctaw and Creek nations, in the Indian Territory, and for other purposes."

The deed in question bears the label "Right-of-Way Deed" and was a deed to the Missouri, Kansas and Oklahoma Railroad. The transfer to the Missouri, Kansas and Texas Railroad apparently is explained by the book called "The Katy Railroad and the Last Frontier" by V. V. Masterson, at page 271 where the author writes:

> "Also submitted for approval were plans to construct a connecting line through the fertile Arkansas River Valley, from Muskogee west through Tulsa to the projected Oklahoma City line at Osage. A further extension of the road from Oklahoma City southeast to a junction with the main line near Atoka also received approval at this time.
>
> "Surveying parties were out and construction crews were being assembled before the stockholders had got home from the meeting. The work was handled in the usual way, under separate charter issued in the name of the Missouri, Kansas and Oklahoma Railroad, which passed the property over to the Katy immediately upon completion. This was a favorite device, as will have been noted, all during the construction period."

The deed in question bears the label "Right-of-Way Deed" and contains the following language:

> "A strip, belt or piece of land 150 feet in width comprising all that portion of the NW/4 etc., extending from the east line of said 160 acre tract northwesterly from station No. 2173443, a distance of 2,493 feet to the north line of said quarter section at station No. 2198436, the same being 75 feet on the center line of the company's railroad, as the same is now located and surveyed over and across the above described subdivision of land. The map of which survey of said railroad has heretofore been approved by the Secretary of the Interior.

The deed contains further this language:

> "This Deed is made by the party of the first part over the allotment of said Clydie Landrum. The certificate number which is No. 2388 under authority of the provisions of the Act of Congress of March 2, 1899, and is intended to convey all of such rights as said party of the first part may lawfully convey to said party of the second part under the provisions of said Act of Congress and the laws of the United States and the undersigned hereby consents that the said railroad company or the persons acting for or under it in construction of its said line of railroad may at once enter upon and take possession of the said above described premises."

The habendum clause of the deed contained the language which uses the words "fee simple."

The Act of March 2, 1899, 30 Stat. at Large 990, mentioned in the deed, provided for the giving of right-of-way to railroads

in Indian Territory. However, this Act was later repealed by the Enid and Anadarko Act of February 28, 1902, The 1899 Act provides as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder.
>
> • • •
>
> "Sec. 2. That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracts, turnouts, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road:

"*Provided,* That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same.

"Sec. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be

returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered by the court shall be final and conclusive.

"When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company. * * * "

• • •

This Act was repealed by the Enid and Anadarko Act, the Act of February 28, 1902, 32 Stat., 43. This Act is labeled as follows:

"An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Enid and Anadarko Railway Company, a corporation created under and by virtue of the laws of the Territory of Oklahoma, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Territory of Oklahoma and the Indian Territory, beginning at a point on its railway between Anadarko and Watonga, in the Territory of Oklahoma, thence in an easterly direction by the most practicable route to a point on the eastern boundary of the Indian Territory near Fort Smith, in the State of Arkansas, together with such branch lines to be built from any point on the line above described to any other point in the Indian Territory as said railway company may at any time hereafter decide to construct, with the right to construct, use, and maintain such tracks, turnouts, sidings, and extensions as said company may deem it to its interests to construct along and upon the right of w and depot grounds hereby granted.

"Sec. 2. That said corporation is authorized to take and use for all purposes of a railway, and for no other purpose,

> a right of way one hundred feet in width through said Oklahoma Territory and said Indian Territory, and to take and use a strip of land two hundred feet in width with a length of two thousand feet, in addition to right of way, for stations, for every eight miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill: *Provided*, That no more than said addition of land shall be taken for any one station."

Although it would appear this applied only to the Enid and Anadarko Act, Section 13 gives the general right-of-way to railroads through Indian Territory. Section 13 of the Act is as follows:

> "That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

"Section 14. That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracts, turnouts, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, roundhouses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purposes shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purpose; and any railway company shall have the right to change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act.

"Section 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes shall be made to

the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated:

Provided, That correct maps of the said line of railroad in sections of twenty-five miles each and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated.

"In case of the failure of any railroad company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in the district where such lands are situated, on application of the corporation or other person or party in interest."

Section 22 of the Act makes any railroad company acquiring, either before or after the passage of this Act, subject to the Act. Section 22 is as follows:

"Sec. 22. That any railroad company which has heretofore acquired, or may hereafter acquire, under any other

> Act of Congress, a railroad right of way in Indian Territory may, in the manner herein prescribed, obtain any or all of the benefits and advantages of this Act, and in such event shall become subject to all the requirements and responsibilities imposed by this Act upon railroad companies acquiring a right of way hereunder. And where the time for the completion of a railroad in Indian Territory under any Act granting a right of way therefor has expired, or shall hereafter expire, in advance of the construction of such railroad, or of any part thereof, the Secretary of the Interior may, upon good cause shown, extend the time for the completion of such railroad, or of any part thereof, for a time not exceeding two years from the date of such extension.

The next section repeals the Act of March 2, 1899:

> "Sec. 23. That an Act entitled 'An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations. Indian lands, and Indian allotments, and for other purposes,' approved March second, eighteen hundred and ninety-nine, so far as it applies to the Indian Territory and Oklahoma Territory, and all other Acts or parts of Acts inconsistent with this Act are hereby repealed."

It is the contention of the Respondent that on abandonment by the railroad company by its conveyance to the City of its right of way, the lands revert to the Indian allottee or to the grantees of the allottee. The 1902 Act applied to the grant.

The railroad acts did not authorize the obtaining of a fee simple title by the railroad. See *Oklahoma Indian Land Titles*

by Semple on page 270 where the author states in discussing the Enid and Anadarko Act:

> "It is to be noted that under this act of Congress no fee simple title passes. Only surface rights are transferred under this act. It is commonly referred to in departmental correspondence as the Enid and Anadarko Act."

In analyzing the character of the interest or title of the railroad company for the purpose of determining whether it could or could not convey to the City, it is necessary to consider the history of legislation for railroad development in the Indian country. Beginning in about 1850 Congress embarked on a policy subsidizing railroad construction by lavish grants from the public domain. This policy incurred considerable disfavor and was crystalized by resolution in the House of Representatives on March 11, 1872, as follows:

> "Resolved, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued." Congress, Globe, 42nd Congress, Second Session 1585 (1872)

After 1871 the practice of outright grant seems to have been discontinued. Following the sharp change in congressional policy, legislation from that time forward has been construed by the Supreme Court of the United States as granting to the railroads no more than a right of passage. An excellent case detailing the history of railroad legislation and the interpretation thereof is *Great Northern Railway Co.* v *United States* (decided 1942) 315 U.S. 262, 86 L.Ed. 836, 62 S. Ct. 529, where the Supreme Court of the United States reconsidered many of the earlier decisions and arrived at the conclusion the General

Railway Act of 1875, 43 U.S.C.A. 934 to 939, Act of March 3, 1875, 18 Stats., 482, conveyed an easement only and not a fee title.

Where a right-of-way has been abandoned the title to the abandoned area vests in the landowners through whose tracts right-of-ways were constructed. See *United States* v. *Magnolia Petroleum Co.*, 110 F. 2d 212, Court of Appeals, Tenth Circuit, 1939:

"2. *Deeds Key 156*

Easements Key 30 (1)

"Generally, the servient estate in a strip of land set apart for a railroad or highway, right of way, or for a street, or small area set aside for school, church, or other public purpose, passes with conveyance of fee to the abutting legal subdivision or tract out of which the strip or small area was carved, even though no express provision to that effect was contained in conveyance and on abandonment of strip or small area of purpose for which it was set apart and dedicated, dominant estate becomes extinguished and entire title and estate vests in owner of abutting legal subdivision or tract.

"3. *Indians Key 13 (2).*

"The provisions of the act for the final disposition of the affairs of the Five Civilized Tribes, which relates to title to land reserved from allotment and abandoned for use for which land was reserved constitutes grant of land reserved from allotments for right of way or other railroad purpose to the owner of the legal subdivision out of which it was

taken, where the railroad had a right in the nature of an easement but failed to acquire legal title by payment within permitted time, or ceased to use land for purpose for which it was reserved. Act April 26, 1906 § 14, 34 Stat. 142.

"4. *Indians Key 13 (2).*

"The purpose of the provision of the act for the final disposition of the Affairs of the Five Civilized Tribes which provides that land reserved from allotment for right of way, or other railroad purposes shall vest in owner of legal subdivision of which land was a part, where railroad had right in nature of easement but failed to acquire legal title by payment within permitted time, or ceased to use land for purpose for which it was reserved, was to avoid the plain evils which would arise from the retention in the tribe as remote dedicator of the strip, or other small tract reserved for right of way or other railroad purposes. Act April 26, 1906, § 14, 34 Stat. 142."

Another case which depends upon the provisions of the Act of Congress of March 3, 1899, 30 Stat. 1368, is the case of *Gutensohn* v. *McGuirt*, 194 Okl. 64, 147 P.2d 777:

"3. *Railroads Key 69.*

"Under Act of Congress of March 3, 1899, authorizing the Fort Smith & Western Railroad Company to take and use for a railway and telegraph and telephone line a right of way through Choctaw and Creek Nations, railroad company had no authority to acquire fee simple title to land within Creek Nation, and deed conveying to railroad company part of allotment of an enrolled Creek freedman

citizen, in so far as it purported to convey fee simple title, was a nullity. Act. Cong. March 3, 1899, § 2, 30 Stat. 1369."

"7. *Railroads Key 69.*

"When Fort Smith & Western Railroad Company ceased to us right of way acquired over land within the Creek Nation for the purposes stated in act authorizing it to acquire such right of way, its rights with respect to such land ceased to exist, and it had no right to transfer title thereto to another. Act Cong. March 3, 1899, § 2, 30 Stat. 1369."

The railroad has abandoned for right-of-way purposes everything except the center 30 feet, and, therefore, under the Acts of Congress heretofore set forth, either the Act of March 2, 1899 referred to in the railway right-of-way deed, or the Enid and Anadarko Act of February 28, 1902, the transfer of title vests in the grantee of the Indian allottee who became vested with the title by reason of the Acts of Congress. In this case we do not have land reserved from allotment, but an original allotment to an Indian. The Indian's guardian granted the right-of-way to the railroad. On abandonment by the railroad title reverts. Therefore, the right of action in the Plaintiff arises under the laws and treaties of the United States. We submit the case is one of Federal jurisdiction. See *Norton* v. *Larney*, Supreme Court of the United States, 45 S. Ct. 145, 266 U. S. 511, 69 L. Ed 413:

"*Courts-jurisdiction-suits arising under laws of the United States.*

"2. If a right to an allotment of Indian Land set up by one claimant, would be defeated by a construction of an act of Congress contended for by the rival claimant, but would

be supported by the opposite construction, a suit to quiet title is one arising under the laws of the United States, within the jurisdiction of the district court, under § 24, subdiv. 1 of the Judicial Code."

It is our contention that the Plaintiff, Midwestern, contends the proper construction of the Act of Congress, the Enid and Anadarko Act, and the Indian Treaties requires a holding that only an easement is given by the right-of-way deed, given pursuant to the Enid and Anadarko Act. The construction insisted upon by the Defendant, City, is that the railroad acquired a fee simple title which in turn has been conveyed to the City of Tulsa by the railroad company. These facts appear in the complaint.

Another case which supports our contention that the trial court had jurisdiction is the case of *Oscar M. Lancaster* and *Patrick M. Kerr* v. *Kathleen Oil Company*, 241 U. S. 551, 36 S.Ct. 711, 60 L.Ed. 1161:

"*Pleading-jurisdictional averments-Federal question.*

"1. Allegations in a bill filed by the lessees of an oil and gas mining lease from the heirs of an Indian homestead allottee for the recovery of possession for a subsequent lessee of the same premises, and for an injunction restraining the assertion of any rights under such lease, and any interference with plaintiffs' rights under their lease, that plaintiffs' lease, though not approved by the Secretary of the Interior, was valid, and that the subsequent lease to defendant, which had such approval, was void because, by the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), the land descended to the heirs of the Indian allottee free

from any restrictions against leasing the same for oil and mining purposes, and because, if that act did impose restrictions as to such a lease, it was repugnant to the Federal Constitution, -- were material to the cause of action stated in the bill, and therefore present a cause of action within the jurisdiction of a Federal district court as a Federal court."

Another case which holds the Court had jurisdiction, based on treaties and laws of the United States, is the case of *Wilson Cypress Company* v. *Enrique Del Pozo Y. Marcos, et al.*, 236 U. S. 635, 59 L. Ed. 758, 35 S. Ct. 446. The applicable syllabus is as follows:

"The jurisdiction of a Federal circuit court over a suit to quiet title was not wholly dependent upon the citizenship or alienage of the parties, so as to make the decree of the circuit court of appeals final, where the bill sought to quiet complainants' title to a tract of land commencing in a grant from Spain, depending for its completeness on a treaty with Spain and certain laws of the United States, and the action under those laws by the officers of the Land Department, and especial reliance was placed upon those laws to defeat defendant's claim of title and to have it removed as a cloud upon that asserted by complainants."

In the Opinion the Court says:

"A motion is made to dismiss the appeal on the ground that the jurisdiction of the court was invoked solely because the complainants were aliens and the defendant was a citizen of the United States. This is a narrow view of the bill. It seeks to quiet the title of complainants to a tract of land commencing in a grant from Spain, depending for

its completeness upon the treaty with Spain and laws of the United States, and the action under those laws by the officers of the Land Department of the United States, and it especially relies on those laws to defeat defendant's claim of title, and to have it removed as a cloud upon that asserted by complainants. Indeed there is scarcely a contention of complainants which does not primarily or ultimately depend upon the laws of the United States. The motion to dismiss is therefore denied."

Our contention, as to Midwestern's rights, finds its foundation in the Creek Treaty of 1866, 14 U. S. Stat. at Large p. 787, *supra:*

"Provided however, That said land thus sold shall not be reconveyed, leased or rented to or be occupied by anyone not a citizen of the Creek Nation according to its laws and recognized usages."

The contention of the Plaintiff finds support in the case of *Jackson* v. *Gates Oil Co.*, 1924, Circuit Court of Appeals, Eighth Circuit, Oklahoma, 297 F. 549. The applicable syllabus is as follows:

"1. *Removal of causes Key 25 (1)—Complaint in suit to cancel oil and gas lease executed by guardian of minor Indian held removable.*

"The complaint in a suit to cancel an oil and gas lease, executed under Act May 27, 1908, by the guardian of a minor, who was a full-blood Choctaw Indian, *held* to assert claims arising under federal law, and hence, under Judicial Code, § § 24, 28 (Comp. St. § § 991, 1010), properly removed to and tried in a federal court."

In this case the Court upheld removal jurisdiction on the ground that questions arising under the laws of the United States were presented by a suit for cancellation of an oil and gas lease for an accounting for oil taken and for a receiver to be put in possession with authority to continue production where the Complaint alleged that Plaintiff was a fullblooded member of the Choctaw Tribe, and that while he was a minor his guardian executed to an individual an oil and gas lease on the acreage approved by the probate court by an order entered on the same day. That thereafter the lease was presented to the Secretary of the Interior who approved it by endorsing his approval thereon which lease was attached to the Complaint and by reference made a part thereof. The lease recited it was made under and in pursuance of the provisions of an Act of Congress of 1908. The Complaint alleged the lease was void because the probate court was without jurisdiction to make the order approving the lease for stated procedural defects. The court stated the case could not be prosecuted to judgment nor defended without construing or giving effect to the Federal Act of May 27, 1908; that the rights which the Complaint asserted Plaintiff claimed and was exercising could only be acquired under Federal law; and that the averments raised the inquiry whether there had been compliance with that law. Applying this principle to our case at bar, we submit that the averments of the Complaint show that the case could not be prosecuted to judgment without giving effect to the Enid and Anadarko Act, and that the rights of the Plaintiff could only be acquired under Federal law.

Another case where it was held the Court had jurisdiction was the case of *Jefferson* v. *Gypsy Oil Co.*, Circuit Court of Appeals, Eighth Circuit, 1928, 27 F.2d 304:

"Suit by guardians of incompetent adopted citizen of Creek Nation of Indians to cancel homestead deeds by her, on the ground that allotment was restricted under patent to her from government, under Act March 1, 1901 (31 Stat. 861), and Act May 27, 1908 (35 Stat. 312), *held* to present a federal question, involving substantial dispute respecting construction of federal Statutes, so as to give federal court jurisdiction."

In this case it was held that a Federal question was presented by a bill because it involved for correct decision of a relevant question the construction of the Act of 1908 and presented in the Court's judgment a question which could not be said to be merely colorless, devoid of merit, or a mere pretense. The action was one by guardians of an incompetent, adopted citizen of an Indian Nation to set aside and cancel her deeds of a homestead allotment embracing a specified number of acres on the grounds they were fraudulently obtained from her while she was incompetent, and that allotment was restricted land under patent to her from the government and under the laws of the United States. The Complaint also asked the Court to enjoin, on the basis it was obtained by fraud and collusion, enforcement of a judgment against the incompetent rendered by a state district court in a case brought by her against the instant defendants and some others in which the state court held the defendant had acquired the fee simple title to her allotment by deeds from her. The court agreed the bill presented a substantial and meritorious question, as to the construction of acts of Congress of 1908, relating to restrictions on alienation or encumbrance. Since the plaintiff guardians were claiming rights of the incompetent as an adopted citizen of the Indian tribe and not as a person of Indian blood, nor a freeman, nor enrolled as either.

A case which has come to our attention is the decision in E. G. Fitzgerald vs. The City of Ardmore and Willie Mae Lane vs. The City of Ardmore, cases No. 6285 and 6301 in the Court of Appeals for the Tenth Circuit, decided by the Court on June 21, 1960. 281 F. 2d 717. The opinion does not discuss the question of jurisdiction. However, we have referred to the original transcript. Both of these cases arose out of the Eastern District of Oklahoma. The case of Willie Mae Lane does not allege diversity of citizenship and does not allege residence of any of the parties. The Complaint alleges to support jurisdiction the following:

> "I. That this action arises under the Fifth Amendment to the Constitution of the United States; the Act of Congress of March 2, 1899, (30 Stat. at L., 990), entitled 'An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes'; the Act of Congress of February 28, 1902, (32 Stat. at L., 43), entitled 'An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railroad Company, and for other purposes'; and the Act of Congress of April 26, 1906, (34 Stat. at L., 137), entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes', all as set out more fully hereinafter: and the matter in controversy herein exceeds the sum of value of $10,000.00."

In the Conclusion of Law the Court concludes as follows:

> "1. That this action involves a construction of Acts of Congress, and particularly the Act of Congress of April 26,

> 1906. The Court has jurisdiction of the parties and of the subject matter of this action and that the matter in controversy herein exceeds in value of the sum of $10,000.00 exclusive of interest and cost.

Apparently, the District Court, the attorneys, and this Court, the Court of Appeals, all felt the Court had jurisdiction. The decision applies only to lands reserved from allotment, and the case holds that the railroad's failure to exercise its right to purchase the land constituted an abandonment of the title in fee on November 1, 1908, and title vested in the allottee.

It is submitted, that if the Court had jurisdiction in the Fitzgerald and Lane cases, then the Court has jurisdiction of the case at bar.

CONCLUSION

The argument in Petitioner's brief that Plaintiff (respondent) has no rights as the land in question might revert to the Indian tribe is of no validity because it is hornbook law that after acquired title inures to the grantee, therefor it is respectfully submitted that the Court of Appeals was correct in holding that the Federal Courts have jurisdiction.

Respectfully submitted,

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